Supreme Court, U. S.
FILED
DEC 23 1978
MICHAEL RODAK, JR., CLERK

NO. 78-1023

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

IN RE MORRIS L. RONEY, SR.,	)
	)
Bankrupt.	)
	)
	)
JOHN McMILLON,	) NO. 77-2188 IN
	) THE UNITED
Petitioner,	) STATES COURT
	) OF APPEALS
vs.	) FOR THE
	) SEVENTH
MORRIS L. RONEY, SR.,	) CIRCUIT.
	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

John P. Long
P.O. Box 87
Lebanon, Illinois 62254
(618) 537-4203
Attorney for the Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. _____

JOHN McMILLON, Petitioner,

vs.

MORRIS L. RONEY, SR., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that the Supreme Court issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case on October 4, 1978.

CITATIONS TO OPINIONS BELOW

The opinions of the bankruptcy judge, the District Court, and the Court of Appeals are printed in Appendix A to this petition. None of the opinions of the courts below were reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1978. The petitioner did not move for a rehearing. The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 1254(1), and 11 U.S.C., Section 47(c).

QUESTIONS PRESENTED FOR REVIEW

I. The question is whether the respondent's knowing failure to list a $16,500.00 secured debt that he owed to a federal savings and loan association, in "Schedule A-2-Creditors Holding Security" of his petition for voluntary bankruptcy, caused his oath to the truthfulness of the schedule to be a false oath that should bar him from being discharged in bankruptcy.

II. The question is whether the respondent's knowing failure to list loan repayments that he had made during the year preceding the filing of his petition for voluntary bankruptcy, in the petition's "Statement of Affairs for Bankrupt Not Engaged in Business," caused his oath to the truthfulness of the statement to be a false oath that should bar him from being discharged in bankruptcy.

III. The question is whether the respondent's contribution to mortgage payments, during the year preceding the filing of his petition for voluntary bankruptcy, on land that he had caused to be owned by his wife alone was a transfer of his property, with the intent to hinder, delay, or defraud his creditors, that should bar him from being discharged in bankruptcy.

IV. The question is whether the respondent's recording, during the year preceding the filing of his petition for voluntary bankruptcy, a deed to land that he had caused to be owned by his wife alone, despite his contribution to the down payment on the land, was a transfer of his property, with the intent to hinder, delay, or defraud his creditors, that should bar him from being discharged in bankruptcy.

STATUTES INVOLVED

The statutory provisions involved are as follows:

18 U.S.C., Section 152 (*see* volume 4, 1970 official edition, pp. 4164, 4165) -

> "Whoever knowingly and fraudulently makes a false oath to account in relation to any bankruptcy proceeding; ***
>
> Shall be fined not more than $5000.00 or imprisoned not more than five years, or both."

11 U.S.C., Section 32(c) (1) and 32(c) (4) (*see* volume 2, 1970 official edition, p. 2065)-

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152; *** or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors;***"

STATEMENT OF THE CASE

The respondent filed a petition for voluntary bankruptcy on December 10, 1976. (R. 72; Pl.'s Ex. No. 14) The jurisdiction of the bankruptcy court was based upon 28 U.S.C., Section 1334, and 11 U.S.C., Section 11.

Although the respondent knew of a $16,500.00 secured debt that he owed to a federal savings and loan association, he failed to list either the debt or the creditor in "Schedule A-2 - Creditors Holding Security" of his petition. (R. 13, 45, 48, 49, 73-78; Pl.'s Ex. No. 1, 10, 11. 25; Pl.'s Exs. No. 2 and 3) The respondent took an oath in his petition that "Schedule A" was a statement of all his debts. (Pl.'s Ex. No. 14) The security for the omitted debt was the respondent's residence, the recorded title to which

was in the name of the respondent's wife alone. (Pl.'s Ex. No. 11)

During the year preceding the filing of the petition for voluntary bankruptcy, the respondent made contributions out of his regular income to monthly payments on the $16,500.00 secured debt. (Respondent's answer, par. 6a; R. 71; Pl.'s Ex. No. 1, pp. 20, 21; Pl.'s Ex. No. 13) The respondent failed to list these contributions as loan repayments in the "Statement of Affairs for Bankrupt Not Engaged in Business" in his petition. (Pl.'s Ex. No. 14) The respondent took an oath in his petition that the answers in the statement were true. (Pl.'s Ex. No. 14)

About two weeks before the beginning of the year preceding the filing of the petition for voluntary bankruptcy, the respondent, in order to avoid the effect of the petitioner's judgment against him, caused land that he and his wife desired to acquire as their residence to be conveyed to his wife alone. (R. 60-62; Pl.'s Ex. No. 1, p. 19; Pl.'s Ex. No. 11) The respondent admitted at the adversary proceeding that he might have paid part of the down payment on the residence. (R. 65-68) About two weeks after the beginning of the year preceding the filing of the petition for voluntary bankruptcy, the respondent recorded the deed to his residence. (Pl.'s Exs. No. 11, 12)

The petitioner filed a complaint objecting to the respondent's being discharged in bankruptcy. The complaint alleged that the respondent had made false oaths in his petition for voluntary bankruptcy and that the respondent, during the year preceding the filing of the petition, had transferred to his property with the intent to hinder, delay, or defraud his creditors. (Petitioner's complaint, Counts I and II)

After an adversary proceeding, the bankruptcy judge stated in a letter his intention to deny the objections and to grant the discharge. This letter revealed that the bankruptcy judge had apparently concluded that the omission of a debt from the schedule of creditors in a bankruptcy

petition would bar a discharge only if it were made for the purpose of concealing an asset related to the debt. The bankruptcy judge stated further, in the letter, that such an asset would have to be of unquestioned value in order for the omission of the debt to bar a discharge. The bankruptcy judge entered an order on April 29, 1977, denying the objections and granting a discharge to the respondent. (*See* Appendix A)

The District Court affirmed that order on September 21, 1977, on the ground that it was not clearly erroneous. (*See* Appendix A)

The Court of Appeals affirmed the judgement of the District Court on October 4, 1978. In an unreported opinion, the Court of Appeals did not refer to the respondent's knowing omission of the $16,500.00 secured debt from the schedule of creditors in his petition for voluntary bankruptcy. (*See* Appendix A)

REASONS FOR GRANTING THE WRIT

1. The petitioner relies only upon the first issue set forth in Questions Presented for Review, which concerns the respondent's knowing failure to list a $16,500.00 secured debt in the schedule of creditors in his petition for voluntary bankruptcy, as a basis for requesting a writ of certiorari. The petitioner raises, but does not now argue, the second, third and fourth issues in order to preserve the issues for review should this petition for certiorari be granted.

2. Every voluntary bankruptcy proceeding in the United States potentially involves the question whether the omission of a debt from the schedule of creditors in the bankruptcy petition should cause the bankrupt's oath to the truthfulness of the schedule to be a false oath sufficient to bar him, under 11 U.S.C., Section 32(c) (1), and 18 U.S.C., Section 152, from being discharged. If the bankrupt has honestly forgotten a debt, so that his omission of the debt is not knowing, the omission of the

debt should not prevent him from being discharged. *See* 18 U.S.C., Section 152. If the bankrupt knows of a debt, however, and yet omits it from the schedule of creditors in the bankruptcy petition, when will that omission cause the bankrupt's oath to the truthfulness of the schedule to be a false oath sufficient to bar him from being discharged? The Supreme Court has never considered this question.

3. Section 152 of Title 18 of the United States Code reveals that the omission of a debt should bar a discharge when it causes the bankrupt's oath to the truthfulness of the schedule of creditors to be "knowingly and fraudulently" false. The federal courts have interpreted "knowingly and fraudulently" to mean "an intentional untruth in a matter material to the issue which is itself material." *In re Steinberg,* 143 F. 2d 942 (2d cir. 1944). The listing by a bankrupt of all his debts in the schedule of creditors in the bankruptcy petition is a material matter in a bankruptcy proceeding. *In re Schnabel,* 61 F. Supp. 386, 389 (D. Minn. 1945). Any knowing omission of a debt by a bankrupt from his schedule of creditors, therefore, should bar him from being discharged, regardless of whether the omission of the debt prejudiced the creditor objecting to the discharge. *See In re Schnabel,* 61 F. Supp. 386 (D. Minn. 1945); 11 U.S.C., Section 32 (c) (1); 18 U.S.C., Section 152.

4. The decision in *In re Schnabel,* 61 F. Supp. 386 (D. Minn. 1945) expressly states that the knowing omission of a debt need not prejudice an objecting creditor in order to cause the bankrupt's oath to the truthfulness of the schedule of creditors to be a false oath sufficient to bar a discharge. The decision in *Stim v. Simon,* 284 F. 2d 58 (2d cir. 1960), *Jackson v. Menick,* 271 F. 2d 806 (9th cir. 1959), and *In re Haydu,* 105 F. Supp. 859 (E.D.N.Y. 1952), also imply such a rule. In this case, however, the bankruptcy judge denied the petitioner's objections to the respondent's discharge on the grounds that the omission of the $16,500.00 secured debt did not conceal any asset of

unquestioned value related to the debt, and, so, did not prejudice the petitioner. *See* Appendix A. The bankruptcy judge's decision, even though affirmed by the District Court and the Court of Appeals, was thus clearly erroneous.

5. The Supreme Court should review this case by a writ of certiorari in order to consider when a bankrupt's knowing omission of a debt from a schedule of creditors will prevent him from being discharged, and, in particular, whether the knowing omission of a debt from a schedule of creditors is inconsequential unless it prejudices the objecting creditor.

CONCLUSION

For the foregoing reasons, this petition for the writ of certiorari should be granted.

Respectfully submitted,

John P. Long
P.O. Box 87
Lebanon, Illinois 62254
(618) 537-4203
Attorney for the Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

OFFICE OF BANKRUPTCY JUDGE
SPRINGFIELD, ILLINOIS 62705

April 21, 1977

Mr. John P. Long
Attorney at Law
P.O. Box 87
Lebanon, IL 62254

Irvin C. Slate, Jr.
Attorney at Law
2037 State Street
Granite City, IL 62040

In Re: Morris L. Roney, Sr., Bankruptcy No. A-Bk-76-54

Gentlemen:

The Plaintiff, John McMillon, a judgment creditor herein, has objected to the discharge of the bankrupt on the ground he knowingly and fraudulently made false oaths in his petition in bankruptcy when he knew he should have scheduled Illini Federal Savings and Loan as a creditor and the payments he made on a mortgage loan to this creditor on his residence, title to which was in his wife's name.

On page 2 of Plaintiff's Memorandum of Law Plaintiff states:

> ...The defendant admitted at the first meeting of the creditors that in 1968 he signed a promisory note and a mortgage in favor of Illini Federal Savings & Loan for $18,000.00. He admitted that the mortgage encumbered the house which is now his residence. He admitted that the loan was still unpaid. When asked how much remained unpaid on the debt to Illini Federal Savings & Loan, he answered without hesitation, 'Sixteen Thousand, five hundred.'
>
> ...Such mortgage payments during the year prior to filing the petition, which were 13 in number, totaled $2077.00. ...Of the 13 mortgage payments during that year, 11 were by checks signed by the defendant, which totaled $1757.00. ...

On page 3 of Plaintiff's Memorandum of Law:

> ...the defendant testified at the first meeting of his creditors that his mother-in-law had paid the entire $5000.00 down payment for the conveyance of his residence ... to his wife.

On page 4 of Plaintiff's Memorandum of Law:

> At the adversary hearing the defendant was confronted with a cancelled check which showed that his mother-in-law had paid only $4000.00 of the $5000.00 down payment. ... The defendant then said that he 'could not remember', but that he 'might have paid' all or part of the other $1000.00.

Plaintiff states that the inconsistency in defendant's testimony shows a continuing purpose on the part of the bankrupt to hide his interest in the residence by concealing his personal liability to Federal Savings and Loan, and to further hide his interest in the residence by virtue of the down payment and mortgage payments.

Ordinarily, the technical omission of a creditor from the schedules of a bankrupt does not amount to a "false oath" requiring denial of discharge; however, an omission of a debt for the purpose of concealing an asset related to the debt, unless an honest mistake, could amount to the making of a false oath for which the maker could be penalized.

Plaintiff-Objector believes that the Bankrupt should have listed his interest in the house and that the bankrupt

should not be the judge of whether he had or didn't have an interest therein. But that is not quite true. If the bankrupt considered his wife the owner and he intentionally omitted any interest therein in his schedules, it does not follow that he committed a prison offense of concealment even if he continued living with his wife on the premises and making monthly payments on the mortgage loan thereon.

When I read Mr. Long's memorandum, I was impressed with his quotation of the Honorable Learned Hand, undoubtedly one of the most astute, fair, and erudite justices in our history, and I immediately went to the case of the Matter of Feynman, (CCA-3rd) 77 Fed (2d) 320, wherein Justice Hand wrote the opinion.

In that case the bankrupt testified that he had transferred within a year of his bankruptcy a life insurance policy, to his wife in furtherance of a pre-marital promise made some 16 years previously. The lower court found there was reasonable ground to believe the policy was fraudulently transferred to his wife and denied the discharge in bankruptcy.

Justice Hand commented:

> We have no doubt that the transfer was in fact a fraud, for the story of the prenuptial promise is a plain figment. A bargain between spouses, unrecorded, sixteen years old, neglected upon an occasion which especially called for its performance, finally performed at a time when the husband had a new motive of the strongest kind to get rid of his property; this fabrication we reject; we are satisfied that the transfer was to put the policy beyond Rosenthal's (the objecting creditor) reach, the common device of the hard pressed debtor.

Further, Justice Hand said:

> On Objections to bankrupt's discharge because of fraudulent transfer of property, *once the fraud is proved,* it makes no difference that the creditors are not seriously injured, or that after bankruptcy, the bankrupt might reclaim the property for a trifle.

In the instant case the bankrupt's mother-in-law advanced $4000 to her daughter for the purchase of a home. Perhaps the rest of the downpayment came from the bankrupt or perhaps from his wife. The record doesn't show. Title to the house was put in the wife's name because the bankrupt feared McMillon's judgment, and a mortgage loan was taken out. The bankrupt made more of the payments on the mortgage than his wife did, or at least he wrote most of the checks, all of which he freely testified to at the first meeting of his creditors. Now, from this, and looking upon it at its worst, I can find no fraud nor any fraudulent intent.

When both the bankrupt and his wife are working, I can see little significance in whose money pays the mortgage debt and whose money pays for the groceries. Anyway, were the property in the bankrupt's name, he would have been creating a homestead exemption by any payments he or his wife made toward reducing the mortgage thereon.

In the Matter of Slocum, 22 Fed (2d) 282, the same court that decided the case above mentioned denied a bankrupt his discharge. The bankrupt testified at the first meeting of his creditors that he had not purchased any stock from one, Lederer; and that he did not receive any salary from the Corbet Company, when in fact, he had purchased $2500 worth of stock from one, Lederer, and had drawn monthly salaries of $500 from the Corbett Company for a period of six or seven months. The court said that a false oath is knowingly and fraudulent made when it is an intentional untruth in a matter material to the issue which itself is material. In the Slocum case the bankrupt testified falsely at the first meeting of creditors, so the court decreed. I find in the case before me that the bankrupt testified honestly at the first meeting of creditors

concerning omissions from his schedules that the objector thought was fraudulent.

In Hanover Capital Trust Co. v Meyer, 47 F (2d) 815 (3 CCA-3rd), the court granted a discharge saying that where bankrupt's petition in bankruptcy gave as his residence a city where he resided about six months of the year, his discharge should not be denied just because his voting residence was in another city, both residences being in his wife's name and there being no intent to defraud; and also he shouldn't be refused his discharge because he omitted from his schedule of assets his salary for the two week period in which his petition in bankruptcy was filed, under the honest belief that it was not an asset of his estate at the time he filed his petition. The court found that the facts were insufficient to bar a discharge on the ground that he "knowingly and fraudulently" made a false oath. This is much the same case as I am called upon to decide.

In the instant case the bankrupt made a complete disclosure at the first meeting of creditors of his interest in his wife's home, and from what he said, and in spite of the objecting creditor's inferences therefrom, I find a complete absence of fraudulent intent to make the bankrupt guilty of false oath. His conduct in omitting the debt due Federal Savings and Loan was not obnoxious nor was the omission of whatever interest he had acquired in his wife's residence by the accumulation of payments on the mortgage loan obnoxious. I therefore, find that the alleged omissions from the schedules and statements were not knowingly and fraudulently made for the purpose of concealing whatever the objector alleges from his trustee in bankruptcy.

When the property not listed is a doubtful right, or a right of doubtful value, the reasonable inference that it was omitted for that reason only is permissible in the absence of evidence showing fraudulent intent. So much the more when the property is of no value. The bankrupt is en-

titled to the presumption that he acted in good faith.*

The objections are denied, and Mr. Slate should draw such an order for my signature.

Very truly yours,
(Signed)
Basil H. Coutrakon
Bankruptcy Judge

BHC:K

*—In re Studley 352 F Supp 277

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

IN THE MATTER OF	)
MORRIS L. RONEY, SR.,	) In Bankruptcy
	) No. A-BK-76-54
Bankrupt	)

IN RE: Claim of John McMillon and Rose McMillon

FILED
April 29, 1977
Basil H. Coutrakon
Bankruptcy Judge

ORDER

This cause coming on to be heard upon the claim of John McMillon and Rose McMillon and the Complaint of John McMillon and Rose McMillon objecting to the

discharge of the bankrupt; John McMillon and Rose McMillon being represented by John P. Long and George Moran, Jr., their attorneys, and the bankrupt being represented by Irvin Slate, Jr., his attorney. Hearing convened pursuant to notice. Witnesses sworn. Evidence heard. Briefs of counsel submitted and considered by the Court.

The Court being fully advised in the premises finds that the allegations of John McMillon and Rose McMillon that the bankrupt committed a fraud upon them or upon this Court are not proven; and the bankrupt testified honestly at the first meeting of creditors concerning omissions from his schedules which the objector thought fraudulent; and the alleged omissions from the schedules and statements were not fraudulently made nor were they intended to conceal material information from the objectors.

THEREFORE, THE COURT ORDERS AND ADJUDGES that Morris L. Roney, Sr., is entitled to a discharge of his liabilities per schedules previously filed herein and discharge therefrom is granted hereby.

Further, the bankrupt is discharged from liability to John McMillon and Rose McMillon or either of them on account of the Judgment entered in the Circuit Court, Third Judicial Circuit, Madison County, Illinois, in cause no. A-BK-76-54 including costs and interest thereon both prior and subsequent to said judgment.

Bankrupt stands discharged.

Entered this 29th day of April, 1977.

(Signed)
Basil H. Coutrakon
Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS —
SOUTHERN DIVISION

IN RE MORRIS L. RONEY, SR.,)
) A-Bk-76-54
Bankrupt.)

ORDER

The cause is before this Court on an appeal from the Bankruptcy Court. I have carefully reviewed the briefs filed by the parties. Based upon those briefs it appears to me that the judgment of the Bankruptcy Court is not clearly erroneous and therefore must be affirmed.

So ordered.

Entered this 21st day of September, 1977.

(Signed)
J. Waldo Ackerman
United States District Judge

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

Submitted: September 28, 1978

October 4, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

IN THE MATTER OF:
MORRIS L. RONEY, SR.,
Bankrupt.

No. 77-2188

APPEAL OF:
John McMillon,
Objecting Creditor.

) Appeal from the
) United States
) District Court for
) the Southern District
) of Illinois, Alton
) Division.
)
) No. A-BK-76-54
) J. Waldo Ackerman,
) *Judge.*

ORDER

This matter comes before the court on the filing of the briefs by the parties and on the motion of the appellee for affirmance without oral argument pursuant to Circuit Rule 15. On consideration whereof, we GRANT the motion and AFFIRM the order of the district court.

On December 10, 1976, defendant Morris L. Roney, Sr. filed a petition for voluntary bankruptcy. Plaintiff-appellant John McMillon, a judgment creditor of Roney, filed a complaint objecting to the discharge of the defendant on two grounds: first Roney had made false oaths in his petition for bankruptcy, in violation of 18 U.S.C. § 152 and section 14(c) (1) of the Bankruptcy Act (11 U.S.C. §32(c) (1)); and, second that Roney had within one year previous to the filing of his petition for bankruptcy transferred or concealed, or permitted to be concealed, part of his property with the intent to hinder, delay, or defraud his creditors, in violation of section 14(c) of the Bankruptcy Act (11 U.S.C. § 32(c) (4)). The referee in bankruptcy conducted an adversary proceeding upon McMillon's complaint, denied the objections and granted Roney a

discharge in bankruptcy. McMillon appealed to the federal district court which affirmed the order of the referee in bankruptcy. It is from that judgment that plaintiff appeals.

On appeal McMillon reiterates the same claim that he has made previously in the bankruptcy court and in the district court., *i.e.* that Roney made false statements in his bankruptcy petitions and that a discharge should not therefore be allowed. He indicates that the three areas of "misrepresentation" on the financial schedule are the source of the down payment for his present residence, the source of the monthly mortgage payments on the same property, and the existence of "gifts" he made to his wife.

An appellate court's functions in reviewing a decision of a referee in bankruptcy is to correct errors of law and reverse a referee's findings of fact when clearly erroneous. *In re Cox,* 132 F. 2d 881, 883 (7th Cir. 1943). Here, the appellant has attempted to frame the facts presented in the adversary hearing so that it appears that Roney, and not his wife, was the de facto owner of his present residence or, alternatively, that Roney's gratuitous paying of the monthly mortgage payments and part of the down payment were in reality "gifts" to his wife. Thus, appellant would have this court reverse the referee's decision and of necessity disregard his observations of the witnesses and his analysis of the underlying facts and circumstances.

Our review of the record does not permit such a result. The evidence presented was sufficient to find that these alleged "misrepresentations" were nothing more than innocent and non-material omissions from the schedules. The record indicates that the source of the $5,000.00 down payment, or at least $4,000.00 of it, was Mrs. Hollis, Roney's mother-in-law, who established a residence with Roney and his wife. She received a $5,000.00 note therefor, which was signed by Roney's wife. The record is not clear concerning payment of the last $1,000.00.

However, it is a fair and reasonable inference that it, also, was paid by Mrs. Hollis as Roney had no money to do so himself. The record also shows that Roney acknowledged that he wrote checks for the mortgage payments against a joint bank account, contributed to by both him and his wife, just as he wrote most of the family expense checks. This evidence does not prove that he had any legal interest in this residence, especially since both he and his wife were working during the year in question. Finally, the record does not show that these payments can be viewed as gifts to his wife. For example, there was no proof that the house payments were made exclusively with Roney's funds or that there was any donative intent on his part. The bankrupt Roney was entitled to a presumption of good faith in omitting items to which he had a questionable right or a right of questionable value. *Willoughby v. Jamison,* 103 F. 2d 821 (8th Cir.), *cert denied,* 308 U.S. 588 (1939); *In re Mascolo,* 505 F. 2d 274, 277 (1st Cir. 1974).

As Roney's failure to list these items on his petitions was not a fraudulent omission, it is not necessary to consider whether McMillon was prejudiced by their being excluded or whether the transfer of property to his wife occurred within the year previous to his filing for bankruptcy.

For these reasons, it is ordered that the motion for affirmance without oral agrument is GRANTED and the district court's order if AFFIRMED.